Supreme Court Justices' Use of Race Terms for African-Americans in Race Based Cases

Presented at the Western Political Science Association 2022 Annual Meeting
New Developments in Judicial Politics Panel
Portland, OR, 10 March 2022

Tim Delaune
Associate Professor of Political Science
SUNY Cortland

Introduction: Description of the Dataset Project

This paper describes a research project undertaken in July 2018 to compile a dataset comprising every instance in which an opinion of the United States Supreme Court has made a race-coded reference to African-Americans, and to use that dataset to derive conclusions about changes to race-based rhetoric both at the High Court and more generally.[1] While this project is potentially scalable to terms used to refer to members of other races, or to persons of particular genders, sexual orientations, religions, or the like, in its present incarnation it identifies and tracks only terms used to refer to African-Americans. The project was funded initially through a grant from the SUNY Cortland Faculty Research Program, and my research assistant in 2018-19, Connor Wright conducted the primary data collection and coding for signed opinions published through 20 April 1971. The project's core aim is to create as complete a dataset of Supreme Court opinions' use of race terms for African-Americans as possible, which can then be used to draw specific conclusions about the use of such terms at the Court, both as an institution and through the rhetorical choices of its individual Justices.

Methodological Overview

The project will proceed in two parts; to date research has only been conducted with regard to Part I. In the first part, I used the Supreme Court Database of the Washington University Law School to populate an Excel file into which instances of race term use can be cataloged.[2] Following

[1] The term "African-Americans" is, of course, just one possible race-coded term that could be used. There is necessarily, given changes in context, rhetoric, understandings of linguistic and civil propriety, etc., no neutral term that can be selected, and African-American itself is somewhat imperfect, as it might be taken to imply reference only to those persons perceived as "black" who have a more or less direct genetic connection to the continent of Africa. (Notably, pursuant to the best available anthropological science, all humans are believed to descend from ancient primate ancestors from Africa.) Nonetheless "African-Americans" seems like a reasonable phrase to use as a general covering term in the context of this project.

[2] The Supreme Court Database is available via http://scdb.wustl.edu (accessed 9 April 2019). It is licensed for public use pursuant to a Creative Commons Attribution-Noncommercial 3.0 US license, available via https://creativecommons.org/licenses/by-nc/3.0/us/ (accessed 9 April 2019). I am indebted to Nicholas Trépanier for

the "logic of the lamppost," Part I looks only at those cases that bear an issue variable code in the Supreme Court Database with a number ranging from 20010 to 20090. This code range identifies case opinions bearing centrally on issues of race discrimination, including voting, the Voting Rights Act of 1965, ballot access, desegregation outside the school context, school desegregation, employment discrimination, affirmative action, slavery or indenture, sit-in demonstrations, and reapportionment outside the purview of the Voting Rights Act.[3] Because race terms for African-Americans are especially likely to be found in opinions regarding civil rights, race discrimination, and the like, Part I of the project looks at the cases that will more certainly have a high density of such terms.

Part II, in turn, will use the terms identified in Part I to search all other signed Supreme Court opinions for further instances in which those terms are used to refer by race to African-Americans. Given the Court's usual parsimony, it would be somewhat unexpected, especially beginning in the mid-twentieth century, to see substantial further instances of race-based terms being used, as they generally would not be relevant to cases outside a race-centered topic; this hypothesis remains untested, however, as the research necessary for Part II is expected to begin in the coming months. Upon completion of Part II, we will have as complete as reasonably possible a dataset of race terms used to designate African-Americans in Supreme Court opinions.

Mining these race-term rich cases, I have compiled each instance in which a term has been used in a Supreme Court opinion on racial issues affecting or regarding African-Americans from the Founding through the 2017 term. In each instance, I have recorded the number of times a race term

technical assistance in setting up the Excel spreadsheet we are using for this research project and creating the chart attached hereto.

[3] See Harold Spaeth, et al., *Supreme Court Database Code Book,* (St. Louis, MO: Washington University Law School, 2017), 101.

is used on each page of an individual Justice's opinion, in case frequency of use becomes relevant to subsequent analysis.[4] A few ground rules have been imposed to guarantee as inclusive a catalog of terms as possible, while also being as clear as possible about the contexts in which they are used.

First, a rather fuzzy discretionary rule dictates that race term adjectives *not* be listed with the nouns they modify, *unless* the noun is "race," or the phrase appears as [noun] of [adjective] (for example, "person of color." Thus "colored person" is coded simply as "colored," while "colored race" is coded as such. A tricky discretionary choice comes into play where, for instance, the target noun of the race-term adjective significantly narrows or particularizes the adjective. So while "negro man" is coded "negro," "negro slave," because it specifies that the person is both African-American *and* in a condition of involuntary servitude, is coded as such.

Second, all race term nouns, whether given in the opinion text as singular or plural, are standardized to singular so as to avoid the uninformative repetition of, for instance, the two race terms "black" and "blacks." This limitation applies, however, only to core race term nouns. So, for instance, "descendants of the African race" would be coded as plural even if there is a code entry extant for "descendant of the African race." "Race" and "races" are also called out separately, and freedmen and freemen are noted alongside freedman and freeman (on the off chance that in analyzing the data we determine that the plural forms of these particular terms hold some particularly relevant significance). While these exceptions are on the surface idiosyncratic, they are preserved for the moment out of an abundance of caution with regard to how the underlying data might ultimately be used. In the accompanying summary chart, most of these distinctions, including, for example, that between "negro" and "Negro," have been eliminated for the sake of simplicity and clarity.

[4] In general, though, I do not expect frequency of use to be a significant variable in the research, as it stems more from the demands of a particular opinion and the number of times to which a race category must be referred, rather than anything clearly reflecting rhetorical choices of the Justices.

Third, in instances where the term "other" is used to distinguish African-Americans from some other race, the race from which they are being distinguished is included in brackets denoting that the race does not appear in the immediate phrase in the opinion text. So where African-Americans are designated as "the other race" in contradistinction to whites, this is coded "the other race [white]."

Fourth, race terms are capitalized or not according to the practice of each opinion authoring Justice. So whether the term is "negro" or "Negro," "black" or "Black," is taken to have potential rhetorical significance in the ultimate analysis of the collected data, and these distinctions are preserved in the coding process. Obviously a race term that begins a sentence is ambiguous as to the intent behind its capitalization. In such cases, the term should be capitalized if the Justice capitalizes it internally to sentences throughout the remainder of the opinion, and is not if not.

Finally, for terms such as "freeman" that could conceivably refer to persons not on the basis of race, the coder uses context clues to attempt to determine whether the term is being used in a racialized way to refer to African-Americans. Only if so is it included in the dataset.

Beyond these coding ground rules, two overarching methodological decisions deserve mention. In the first case, because we are (among other things) interested to know which Justices use which terms, race terms appearing in opinions of unknown authorship (e.g. per curiam opinions, or joint opinions such as the nine-author opinion in *Cooper v. Aaron*,[5] or Justice Brennan's separate opinion in *Regents of the University of California v. Bakke*[6] – coauthored (rather than being joined) by Justices White, Marshall, and Blackmun[7] – are coded only if a lead author is apparent from history or context. This is not the case in *Cooper*, and so that case is not coded for race terms, as it is

[5] 385 U.S. 1 (1958).

[6] 438 U.S. 265 (1978).

[7] Id. at 324.

impossible to know who wrote the opinion for the Court.[8] In *Bakke*, however, Justice Brennan's opinion appears to be primarily his work although facially coauthored by White, Marshall, and Blackmun, because the latter three Justices wrote their own separate opinions.[9]

The second, and rather more obvious, methodological choice is to exclude race terms where they appear in text quoted by an opinion author. Where a Justice is quoting another Justice, a statute, a lower court case, or dialog between parties, we learn nothing about the Court and its members' use of race terms.

Preliminary Findings

With examination of all Part I case opinions now complete, I have identified 102 distinct race terms for African-Americans (pursuant to the coding rules summarized above). As an initial matter, I found race terms used in nineteenth century opinions that were surprising to various degrees. Perhaps most startling was the unexpectedly early appearance of phrases akin to "persons of color."[10] The first such reference found in Part I of the project thus far appears *Mima Queen v. Hepburn*,[11] followed by uses in *The Mary Ann v. Plumer*,[12] *The Merino, et al., Claimants*,[13] *United States v. Preston*,[14] *Lee v. Lee*,[15] *United States v. The Ship Garonne*,[16] *Prigg v. Pennsylvania*,[17] *The Slavers Cases*,[18] *Hall v.*

---

[8] Justice Frankfurter's separate opinion in that case, at 385 U.S. 20, is, however, coded for race terms.

[9] In *Bakke*, the Brennan joint opinion uses "Negro" exclusively. Though by 1978 Justice Brennan had begun using black somewhat more frequently in his authored opinions, "Negro" was still his general preference, according to the data.

[10] These include "citizens of color," "free persons of color," "man of color," "person of color," and "people of color."

[11] 11 U.S. 290, 299 (1813) (Duvall, J.).

[12] 21 U.S. 380, 388 (1823) (Marshall, C.J.).

[13] 22 U.S. 391, 404 (1824), (Washington, J.).

[14] 28 U.S. 57, 64, 65, 66 (1830) (Johnson, J.).

[15] 33 U.S. 44, 46 (1834) (Thompson, J.).

[16] 36 U.S. 73, 77, 78 (1837) (Taney, C.J.).

[17] 41 U.S. 539, 650 (1842) (Wayne, J.); id. at 671 (McLean, J.).

[18] 69 U.S. 366, 370 (1865) (Clifford, J.); 69 U.S. 375, 279 (1865) (Clifford, J.); 69 U.S. 383, 393 (1865) (Clifford, J.).

United States,[19] *United States v. Reese*,[20] *Hall v. Decuir*,[21] *Strauder v. West Virginia*,[22] *Neal v. Delaware*,[23] *Louisville v. New Orleans and Texas Railway Co.*,[24] and in its last appearance in a Court opinion prior to 1917, in *Buchanan v. Warley*.[25]

Subsequent instances occur in especially important nineteenth century race-related cases, including Chief Justice Taney's opinion in *Dred Scott v. Sandford*.[26] The term also appears in other opinions in that case,[27] and recurs in the *Civil Rights Cases*,[28] and in *Plessy v. Ferguson*.[29] The widespread early use of this race term came as a bit of a surprise given its contemporary status as a term used to push back against verbiage used to describe African-Americans that was considered condescending in that it prioritized the race rather than the personhood of those described. Thus the modern use of "person of color" and related terms was considered an innovation designed to highlight African-Americans' personhood, in contrast to, say, "colored people," which put the visible skin color characteristic of perceived race ahead of such persons' humanity in the relevant phrases.[30] Although it appears that other scholars have long been aware of older uses of "person of color" and related

[19] 92 U.S. 27 (1876) (Swayne, J.) (man of color).

[20] 92 U.S. 214, 222, 225 (1876) (Clifford, J.) (citizens of color).

[21] 95 U.S. 485, 492, 493, 500, 508 (1878) (Clifford, J.) (man of color).

[22] 100 U.S. 303, 306 (1880) (Strong, J.)

[23] 103 U.S. 370, 398 (1881) (Waite, C.J.); id. at 399, 400 (Field, J.) (person of color, person of the colored race, and person of that race [colored]).

[24] 133 U.S. 587, 589 (1890) (Brewer, J.)

[25] 245 U.S. 60, 73, 74, 76, 78, 79, 81, 82 (1917) (Day, J.)

[26] 60 U.S. 393, 422 (1857).

[27] 60 U.S. at 533 (McLean, J.); and 60 U.S. 574, 575, 587, 588 (Curtis, J.).

[28] 109 U.S. 3, 15 (1883) (Bradley, J.).

[29] 163 U.S. 537, 546 (1896) (Brown, J.).

[30] See, for example, Kee Malesky, "The Journey from 'Colored' to 'Minorities' to 'People of Color,'" *NPR*, 30 March 2014, available via https://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color (last accessed 10 April 2019).

terms in American history, this initially surprising (to me) finding also allows me to document the evolution of that term in Supreme Court opinions.

In terms of more general observations regarding changes in race-related terminology as applied to African=Americans in Court opinions, the most noticeable trend was the transition from "negro" to "Negro" in written opinions. Far and away "negro" was the most widely used race code for African Americans in the twentieth century. It has been used by nearly every Justice who wrote an opinion since the 1920s, before most Justices began capitalizing the term in the 1940s. The first such case was an opinion by Chief Justice Marshall in the case of *Scott v. Negro London.*[31] In this case the only race term used by the Chief Justice was "negro." A general preference for that term by all Justices was consistent through the 1800s. Chief Justice Taney in the infamous *Dred Scott* decision, used the lower case form of "negro" (among other terms) to describe African-Americans.[32]

In the early 1900s the use of both the lower case and capitalized versions of the term became prevalent. Slowly but surely the capitalized form "Negro" became the new standard race term used by the Justices. The last documented use of lowercase "negro" in my research by was Justice Douglas in *MacDougall v. Green.*[33] 335 U.S. 281 (1948). Thus for 142 years the Justices referred to African-Americans by the lowercase version of the term, before switching consistently to the capitalized version (though both versions were used intermittently along with other same terms).

Another surprising find was the sheer number of distinct race terms that the Justices have employed. Aside from "negro," popular race terms over the years have included "slave race," "negro race," "African race," "colored," "people/person of color," and "black." In addition to

---

[31] 7 U.S. 324 (1806).

[32] See, for example, 60 U.S. 393 at 403, 407, 408, 409, 411, 412, 413, 417, 422. Perhaps for stylistic reasons, however, Taney used number of different race terms throughout his lengthy opinion for the majority, including, of course, variations on "persons of color." See text accompanying note 24.

[33] 335 U.S. 281, 289 (1948).

these more or less expected terms were some that stood out as particularly stilted in ways that reflected the prejudices and embedded cultural understandings of the times in which they were written. Among these, especially in the nineteenth century, were such terms as "class of persons who were imported as slaves," "from a common ancestry and country of the same class of men [African slaves]," "inferior and subject race," "particular race which the nation has liberated," "persons transported from Africa," "race which the white race had reduced to slavery," "unfortunate race," and "unhappy race." Many of the more oblique of these terms resonate with the squeamishness shown by the Founders when referring to race and slavery in the United States Constitution.

At the outset of this research, the first three cases recorded were among the most monumental and historic race-based cases in our history, save *Brown v. Board of Education*.[34] Those three cases, *Dred Scott*, *Plessy*, and *The Civil Rights Cases* were used as a trial run to distinguish the best and most efficient ways to collect and record data. They also began our list of race terms with over 40 of these emerging from those cases alone. In *Dred Scott*, Chief Justice Taney used 28 different race codes, many of which were readily detected, while others were tougher to distinguish. In that opinion for example, he wrote: "We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race."[35] His use of "race" in that context – of undoubted interest to modern theorists of race – does not refer to physical characteristics associated with African-Americans, but rather to the social and political

[34] 347 U.S. 483 (1954).

[35] *Dred Scott*, 60 U.S. at 409.

situation in which the United States at the time placed persons sharing physical (and thus presumed racial or national origin) characteristics.[36]

In some instances, determining a race term's use in an opinion requires close attention. One such instance involved the case of *Smith v Turner*.[37] The case questioned the constitutionality of state statutes allowing for taxation on all passengers entering the state from a foreign port. Justice Wayne's majority opinion discusses the unconstitutionality of the statute under the Constitution's naturalization clause, stating: "But I have said the States have the right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men."[38] Is "the same class of men" a reference to African-Americans, to vagabonds and paupers, or to only those African-Americans that are also vagabonds and paupers? (I have concluded, by parsing the grammatical effects of the interstitial commas, that he meant the first.)

A few race codes been used in the past have fallen out of use and then back into use again years later. As noted above, I anticipated "people of color" returning as a race term in cases opinions at some point in the late twentieth century, and indeed, after its last nineteenth century use in *Louisville, New Orleans and Texas Rwy Co. v. Mississippi*, 133 U.S. 587, 589 (1890) (Brewer, J.), it recurs first in *Buchanan v. Warley*, 245 U.S. 60 (1917) (Day, J.), but then next in Justice Ginsburg's dissent in *Adarand Constructors, Inc. v. Peña* (1995), its last appearance in a signed opinion through May 2017.

Another prime example of this is the term rise and fall in the popularity in opinions of the race term "black." It is a fairly often used race code throughout modern, i.e. twentieth century,

[36] To be clear, this reference does meet the criteria for inclusion in the dataset.

[37] 48 U.S. 283 (1849).

[38] Id. at 426.

Supreme Court history. But the first occurrence of "black" comes in the 1842 case *Prigg v. Pennsylvania* where Justice Wayne states that "the claim for the states to legislate is mainly advocated upon the ground that they are bound to protect free blacks and persons of colour residing in them from being carried into slavery by any summary process."[39] The next appearance of that race term comes a full seven years later in a dissenting opinion written by Justice Woodbury in *The Passenger Cases*.[40] Subsequently, "black" was not used (in those cases examined thus far) for another thirty-one years, finally recurring in Justice Strong's controlling opinion in *Strauder*.[41] From there into the early 1900s "black" was used infrequently, though it is, as the appended chart indicates, the most used term of any for African-Americans by Justices in the modern era.

Similarly the term "colored" has been used frequently in Supreme Court opinions, though it has fallen radically out of favor beginning in the late twentieth century. By and large in opinions after the 1940s the term only appears in quotations from prior opinions or other sources. "Colored" was used as early as the 1830s by Justice William Johnson in his opinion in *United States v. Preston*.[42] After "negro" or "Negro" it was one of the most used race codes of the early twentieth century. Sometime around 1950, "Negro" took over as the most widely used race code of all, bringing an end to the use of "colored" almost all together. The last recorded instance of "colored" being used by a Justice (other than in quotation) comes in the 1967 case *Reitman v. Mulkey*.[43]

---

[39] *Prigg*, 41 U.S. at 650.

[40] 48 U.S. 283, 527, 543, 550, 557 (1849).

[41] 100 U.S. at 307.

[42] 28 U.S. at 65, 66.

[43] 387 U.S. 369, 384 (1967) (Douglas, J.).

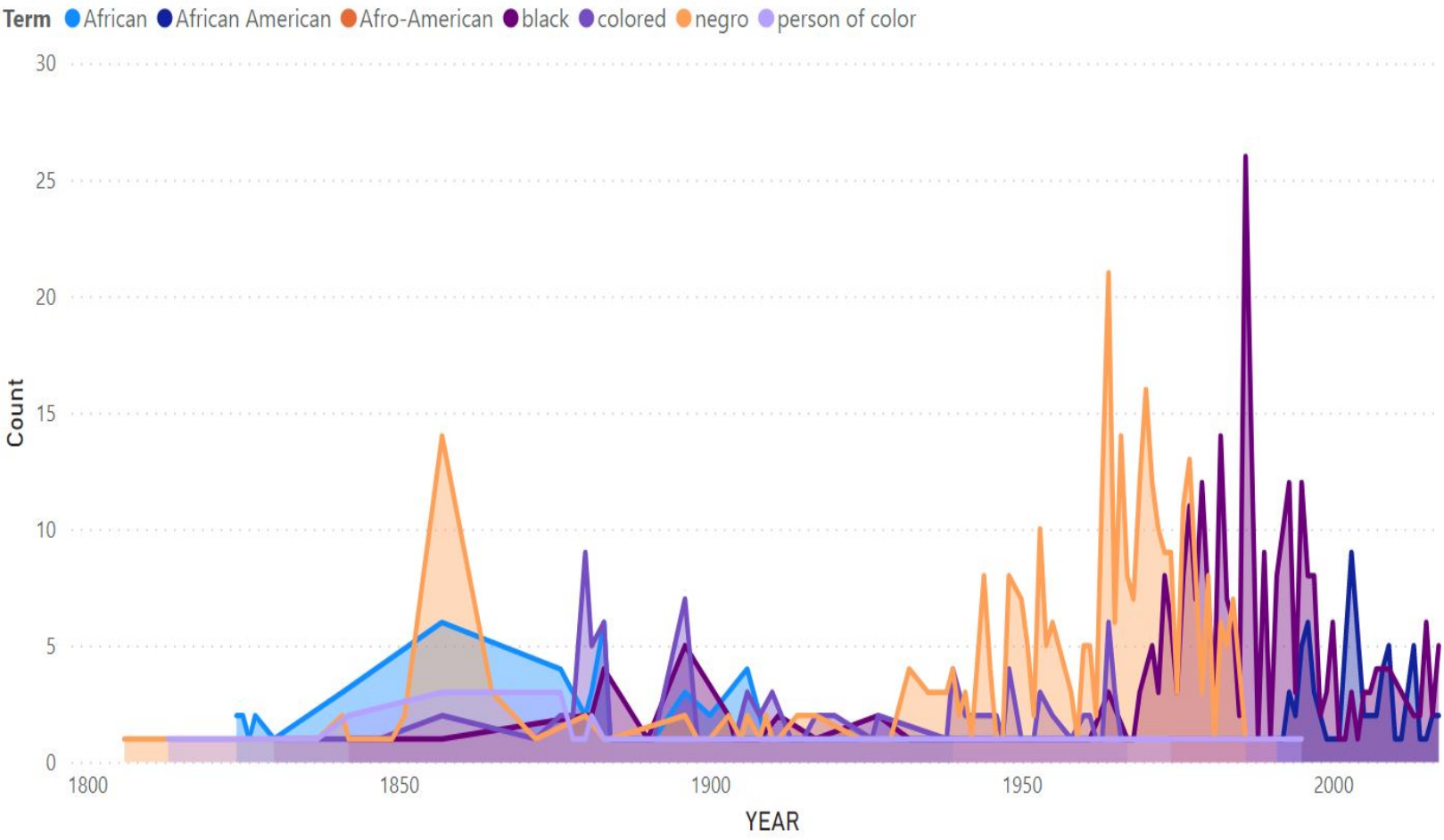
Conclusion

The accompanying chart illustrates the overall trends for the most frequently seen and currently significant race terms for African-Americans, namely "African," "African-American," "Afro-American," "black" (without regard to capitalization), "colored," "negro" (again combining capitalized and lower-case forms), and "person of color." As the chart demonstrates, "negro" fell in and out of fashion in the mid-nineteenth century, and its use picked up again in roughly the 1930s before declining abruptly in the mid 1980s. Black, which was used on and off throughout the nineteenth and early-to-mid twentieth centuries, became the dominant term used on the Court in about the 1960s, remaining so through the late 1990s. It is now in fairly close competition with its only remaining real competitor (at least through 2017), "African-American" (with or without hyphen).

To an extent, these results of Phase I tend to show the following: 1) the Court's use of terms lags the public's adoption of new terms. 2) Justices are rather idiosyncratic in their uses of the terms: some alternate or appear to follow no discernable pattern over time, perhaps owing to the initial drafting of their opinions by clerks; others, such as Justice Thurgood Marshall, the first African-American Supreme Court Justice, are remarkably consistent, with Marshall being among the last to continue using "Negro," as late as in 1984's *Hobby v. United States*, 468 U.S. 339.[44] 3) There are clear patterns that, at least in the case of contemporary Justices, appear to illustrate possible politically or socially motivated trends in race term usage. For instance, Justice Thomas consistently uses the term "black" only (not capitalized), as does, interestingly, Justice Sotomayor. Among the remaining currently sitting Justices, excluding Justices Gorsuch, Kavanaugh, and Barrett who were appointed after the conclusion of the 2016 term in June 2017, Chief Justice Roberts toggles between

[44] The last use of Negro appears in an opinion for the Court by Justice White in *Davis v. Bandemer*, 478 U.S. 109, 137 (1986), as a single exception to White's usual use of black, the term he uses in his other two race references in that opinion.

"black" and "African-American," sometimes within the same opinion, as do Justices Breyer and Alito; Justice Kagan uses both terms in the sole opinion she authored on a centrally race-based topic, in her opinion for the Court in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). In addition to completing Part II, future research will seek to identify more specific such patterns, both over time and across Justices.


Term
African
African American
Afro-American
black
colored
negro
person of color
30
25
20
15
10
5
0
Count
1800
1850
1900
1950
2000
YEAR

Bibliography

Malesky, Kee. "The Journey from 'Colored' to 'Minorities' to 'People of Color.'" *NPR*, 30 March 2014. Available via https://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color (last accessed 10 April 2019).

Spaeth, Harold, et al. *Supreme Court Database Code Book*. (St. Louis, MO: Washington University Law School, 2017).

Washington University Law School, *Supreme Court Database*. Available via http://scdb.wustl.edu (last accessed 9 April 2019).

Table of Legal Authorities

[45] 335 U.S. 281, 289 (1948).

Reitman v. Mulkey, 387 U.S. 369 (1967).

Scott v. Negro London, 7 U.S. 324 (1806).

The Slavers Case (Reindeer), 69 U.S. 393 (1865).

The Slavers Case (Sarah), 69 U.S. 366 (1865).

The Slavers Case (Weathergage), 69 U.S. 375 (1865).

Strauder v. West Virginia, 100 U.S. 303 (1880).

United States v. Preston, 28 U.S. 57 (1830).

United States v. Reese, 92 U.S. 214 (1876).

United States v. The Ship Garonne, 36 U.S. 73 (1837).

United States Constitution.